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No. 04-1046

Supreme Court, U.S.
FILED
MAR 14 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TOWNSHIP OF UPPER MORELAND,

Petitioner,

v.

NORTHWOOD CONSTRUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Township of Upper Moreland ("Upper Moreland"), respectfully submits this reply to address several new points raised by Respondent, Northwood Construction Company ("Northwood"), in its brief in opposition ("Opposition Brief") to Upper Moreland's Petition for a writ of certiorari.

Lacking a legitimate response to the sole issues presented by Upper Moreland's petition – *i.e.*, (i) whether the Supreme Court of Pennsylvania's decision conflicts with this Court's decisions upholding unapportioned gross receipts taxes, and (ii) whether the Pennsylvania Supreme Court improperly imposed on Upper Moreland a single formula for the apportionment of the interstate income of a taxpayer with its only office within Upper Moreland – Northwood attempts instead to distract the Court with irrelevant and incorrect facts and non-responsive arguments.

Thus, for example, Northwood continues to press its position – which was ***rejected*** by the Pennsylvania courts – that its temporary job-site trailers are *bona fide* offices "with phone, utility, fax and copier services" that are "critical to Northwood's business activities outside the Township." Opp'n Br. at 1. Northwood took that position below in support of its unavailing argument that Upper Moreland's Business Privilege Tax ("BPT") was not authorized by Pennsylvania's Local Tax Enabling Act. Irrespective of its lack of merit, that argument – which the Pennsylvania Supreme Court discussed at length and rejected, *see* App. at 11a-18a – is entirely irrelevant to the issues presented here.

To the extent that it were relevant at all whether Northwood's trailers constituted *bona fide* offices, the

Pennsylvania Supreme Court ***accepted*** Upper Moreland's interpretation that its Allocation Regulations were not triggered with respect to Northwood because Northwood did not have any *bona fide* offices outside Upper Moreland. App. at 23a n.13. Indeed, the Pennsylvania Supreme Court held that "supervision of projects from temporary on-site offices simply 'does not negate the fact that the root of all of the company's business is at its sole permanent business headquarters.'" App. at 16a (agreeing with, and quoting, the Pennsylvania Commonwealth Court). Yet, as Upper Moreland noted in its Petition, the Pennsylvania Supreme Court improperly ignored that fact and thus effectively required Upper Moreland to rewrite its Allocation Regulations in contravention of this Court's precedent giving local governments discretion to craft such regulations. Pet. at 7-8; 11.

In a further futile attempt to justify the Pennsylvania Supreme Court's improper imposition on the Township of a particular apportionment formula, Northwood falsely asserts that Upper Moreland stipulated that Northwood paid "either gross receipts taxes or net income taxes to other states." Opp'n Br. at 10. Although Upper Moreland stipulated that Northwood paid such taxes to ***other Pennsylvania municipalities***, App. at 7a n.5, and Upper Moreland correctly excluded receipts from those municipalities in calculating Northwood's BPT liability, Upper Moreland did ***not*** stipulate that Northwood paid gross receipts or similar taxes in other states because that is not true. *See* App. at 27a n.18. Accordingly, Northwood cannot contend that it was subject to multiple taxation.

Finally, demonstrating its understandable lack of confidence in the argument that the BPT is not externally consistent for purposes of the fair apportionment prong of the test for the constitutionality of state and local taxes set

forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), Northwood resorts to arguing in the alternative that the BPT is ***internally*** consistent and that it fails the discrimination and fair relation prongs of the *Complete Auto* test. Opp'n Br. at 4; 4 n.21; 10. Significantly, however, the Pennsylvania courts uniformly held that the BPT was internally consistent. App. at 24a-26a (Pa. Sup. Ct.); 41a (Pa. Commw. Ct.); 53a-54a. (Pa. Com. Pl. Ct.). Moreover, the two lower courts found that the BPT satisfied all parts of the *Complete Auto* test, and the Pennsylvania Supreme Court did not address the discrimination and fair relation prongs. App. at 42a-44a (Commw. Ct.); 54a (Com. Pl. Ct.); 19a (Sup. Ct.). Whether those decisions were correct, however, has no bearing whatsoever on Upper Moreland's Petition.

CONCLUSION

Cleared of its diversionary underbrush, Northwood's Opposition Brief offers no reason why Upper Moreland's petition for a writ of certiorari should not be granted.

Respectfully submitted,

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MARCH 2005